OMEGA SECURITIES SDN BHD

v.

KETUA PENGARAH INSOLVENSI MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
MAH WENG KWAI J
[BANKRUPTCY NO: D-29-681-2007]
27 APRIL 2012

BANKRUPTCY: *Interest - Calculation of interest - Proof of debt - Proof of debt rejected by Director General of Insolvency - Whether there was wrong calculation thereof - Whether judgment creditor could claim interest for more than six years from date of judgment - Whether entitled to rate 12.8% per annum - Merger Principle - Applicability - Whether interest to merge into judgment debt - Proof of debt - Whether "an action upon any judgment" - Bankruptcy Act 1967 s. 43(6) - Limitation Act 1953, s. 6(3)*

On 14 March 2001, the judgment creditor in this case ('JC') obtained a judgment in default in the Sessions Court against the judgment debtor ('JD') for a sum of "RM45,959.40 as at the date of default, 5 June 1998, and interest at 12.8% per annum on RM45,959.40 from 6 June 1998 until full realization ..." The facts showed that a part-payment of RM5,260.71 towards the judgment sum was made by the JD on 1 May 2001. Be that as it may, the JC commenced bankruptcy proceedings against the JD, and on 27 May 2008 obtained the Adjudication and Receiving Orders against the JD ('AO/RO'). On 11 December 2009, the JC filed the proof of debt ('POD') for RM100,445.24, which sum included claims for interest at 12.8% per annum for a period of more than seven years, *ie*, from 1 May 2001 to 27 May 2008 (date of AO/RO). It was the JC's view that, whilst s. 6(3) of the Limitation Act 1953 limited its claim for interest to six years, that section did not apply as the POD was not "an action upon any judgment" spoken of in the section. It was further the JC's view that the amendment to s. 43(6) of the Bankruptcy Act 1967 *vide* Act A 1197 fixing the rate of interest at 6% per annum up to the date of the Adjudication and Receiving Orders, which came into force on 1 October 2003, did not apply retrospectively, and hence did not affect its claim for interest herein. The respondent, the Ketua Pengarah Insolvensi Malaysia, on the other hand, opined that the

JC was only entitled to claim interest at 6% per annum on the sum of RM40,698.69 (*ie*, RM45,959.40 less the part payment), and only for a period of three years and 11 months from 2 May 2001 to 4 June 2004, and in the circumstances, rejected the debt sum of RM65,995.35 in the POD, and approved and accepted only a sum of RM34,449.89. The clear provision of s. 6(3) of the Bankruptcy Act 1967 aside, it was the Ketua Pengarah's stand that the amended s. 43(6) of the Bankruptcy Act 1967 applied retrospectively to the JC. Dissatisfied, the JC applied to the deputy registrar to reverse the decision of the respondent, and being unsuccessful thereat, appealed to the judge in chambers.

Held (allowing appeal with costs):

(1) The bankruptcy proceedings were founded on the judgment in default and the POD filed as a result of the grant of the AO/RO by the court is sequentially another step in the bankruptcy proceedings premised on the judgment in default. The filing of the POD by the JC is thus an "action upon a judgment" within the meaning of s. 6(3) of the Limitation Act 1953. Consequently, the maximum period of interest that the JC could claim is six years after 14 March 2001 (date of judgment). (para 19)

(2) There is a plethora of cases establishing the principle that when interest accrued at an earlier date and a judgment is obtained thereafter, the interest is merged into the judgment sum based on the Merger Principle (*Perwira Affin Bank Bhd v. Lim Ah Hee;* (foll); *Re Ernest Cheong Yang, ex p United Malayan Banking Corporation Bhd* (foll); and *Moscow Norodny Bank Ltd v. Ng Ching Wen*; foll)). The Federal Court in *Perwira Affin* indeed also held that s. 6(3) of the Limitation Act 1953 applied to bankruptcy proceedings and that the arrears of interest may only be claimed for a period of six years from the date of judgment. In the circumstances, applying the Merger Principle, the court would allow interest for a period from 6 June 1998 (a day after default in payment and as per judgment in default) to 14 March 2001 (date of judgment in default) to merge into the judgment debt. Consequentially, the date the interest became due was the date of the judgment (14 March 2001) and not the earlier date. (paras 22, 24 & 25)

(3) The reliance by the respondent on the date 2 May 2001 as being the commencement date for the calculation of interest was wholly without basis and incorrect in view of the Merger Principle. The JC in any case was entitled to claim interest for six years from 15 March 2001 (the day after judgment in default) up to 14 March 2007 only, pursuant to s. 6(3) of the Limitation Act 1953. The JC was not entitled to claim for interest beyond the six years up to 27 May 2008 (date of AO/RO). (paras 26-27)

(4) The amendment to s. 43(6) of the Bankruptcy Act 1967 does not take effect retrospectively but prospectively. The amendment to the rate of interest chargeable under s. 43(6) is an amendment to a substantive law and not a procedural requirement. The amendment cannot therefore take away the JC's accrued right under s. 43(6). The Amending Act also did not clearly and specifically provide that the amendment would have a retrospective effect. The JC is therefore lawfully entitled to claim interest at a specified rate pursuant to the terms of the judgment in default. The JC had a legitimate expectation that as at 14 March 2001 (date of judgment in default) it had the right to interest at the rate of 12.8% per annum on the principal sum and not at 6% per annum until full realisation. (paras 35-37)

(5) On the facts and in the circumstances, the JC may claim: (i) interest at the rate of 12.8% per annum from 15 March 2001 (day after date of judgment in default) till 30 April 2001 (day before part-payment) on the sum of RM45,959.40; and (ii) interest at the rate of 12.8% per annum from 1 May 2001 on the balance principal sum of RM40,698.69 up to 30 September 2003 (day before the coming into force of the amendment to s. 43(6); (iii) interest at 6% per annum from 1 October 2003 (date of coming into force of the amendment) to 14 March 2007 (date of limitation of six years). (paras 38-39)

Case(s) referred to:

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Tan Tien Chi & Anor [1995] 3 CLJ 520 CA ***(refd)***

Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2009] 6 CLJ 405 FC ***(refd)***

Moscow Norodny Bank Ltd v. Ngan Ching Wen [2004] 2 CLJ 241 FC ***(refd)***

Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(refd)***
Re Ang Swee Hian; ex p Avenue Securities Sdn Bhd [2008] 10 CLJ 467 HC ***(refd)***
Re: Ernest Cheong Yong Yin (I.C. No. 7620423); Ex-parte: United Malayan Banking Corporation Berhad [1997] 1 LNS 50 HC ***(refd)***
RHB Bank Bhd v. Ya'acob Mohd Khalib [2008] 1 CLJ 80 CA ***(refd)***
Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad [1995] 1 CLJ 491 CA ***(foll)***
Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ (Rep) 277 SC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 43(6), 86
Bankruptcy (Amendment) Act 2003, s. 6
Bankruptcy Rules 1969, rr. 184, 186
Limitation Act 1953, s. 6(3)
Rules of the High Court 1980, O. 29 r. 1(2B)

For the judgment creditor/applicant - Bahari Yeow Tien Hong; M/s Lee Hishammuddin Allen & Gledhill
For the respondent - Rosli Ahmad (Zaili Hafiza with him) FCs

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Mah Weng Kwai J:

Brief Facts Of The Case

[1] The judgment creditor/applicant is a stock broking firm and the judgment debtor was a stock broker/remisier. On 14 March 2001, the judgment creditor entered judgment in default for the sum of RM45,959.40 (as at 5 June 1998).

[2] The judgment debtor's application to set aside the judgment in default was dismissed and his appeal to the High Court was also dismissed.

[3] The judgment creditor commenced bankruptcy proceedings to recover the judgment sum together with interests and on 27 May 2008, the judgment creditor obtained the adjudication and receiving orders (AO/RO) against the judgment debtor. The judgment creditor filed its proof of debt (POD) on 11 December 2009 for the sum of RM100,445.24.

[4] However on 20 July 2011 the Ketua Pengarah Insolvensi, the respondent in this application issued the Notis Penolakan Borang Bukti Hutang and refused to admit the debt in the sum of RM65,995.35 and only accepted the POD for the sum of RM34,449.89.

[5] On 4 August 2011 the judgment creditor filed this application to reverse the decision of the respondent but the application was dismissed by the deputy registrar on 14 November 2011.

[6] Being dissatisfied with the decision, the judgment creditor filed its appeal to the judge in chambers.

[7] The sum of RM65,995.35 in the POD rejected by the respondent comprises only of the interest element based on the period during which the judgment creditor calculated its interest and the rate of interest applicable.

[8] The judgment in default dated 14 March 2001 provides as follows:

> Defendan dikehendaki membayar kepada Plaintif jumlah sebanyak RM45,959.40 setakat 5hb. Jun 1998 dan faedah pada kadar 12.8% ke atas RM45,959.40 dari 6hb. Jun 1998 sehingga tarikh penyelesaian penuh ...

Judgment Creditor's Claim

[9] Pursuant to the judgment, the judgment creditor essentially claimed interest at the rate of 12.8% per annum on the sum of RM45,959.40 for the period from 5 June 1998 (date of default of payment by the judgment debtor) to 1 May 2001 (date of part payment of RM5,260.71) and thereafter the judgment creditor claimed interest at the rate of 12.8% per annum on the balance sum of RM40,698.69 for the period from 1 May 2001 (date of part payment) to 27 May 2008 (date of AO/RO).

Respondent's Allowance

[10] The respondent allowed the judgment creditor to claim interest at the rate of 6% per annum only on the sum of RM40,698.69 for the period from 2 May 2001 to 4 June 2004.

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Issues To Be Determined By The Court

[11] In this appeal, the two main issues to be considered by the court were namely:

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a) whether the judgment creditor could claim interest for the period up to 27 May 2008 (date of AO/RO) which would be more than six years from 14 March 2001 (date of judgment in default) or the judgment creditor could only claim for a period of six years up to 4 June 2004, in view of s. 6(3) of the Limitation Act 1953; and

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b) whether the judgment creditor could calculate interest at the rate of 12.8% per annum on the judgment sum for the period claimed or whether the judgment creditor could only calculate interest at the rate of 6% per annum in view of the amendment to s. 43(6) of the Bankruptcy Act 1967, which came into force on 1 October 2003.

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Decision Of The Court

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[12] Upon reading the long and often repeated submissions of counsel for the judgment creditor and the skimpy submissions of Federal Counsel for the respondent and upon hearing the oral submissions of counsel aforesaid, the court held as follows:

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(a) the maximum period of interest that the judgment creditor can claim is six years after 14 March 2001 (date of the judgment) and

(b) the rate of interest that the judgment creditor can claim is 12.8% per annum as the provision of the amendment to s. 43(6) of the Bankruptcy Act 1967 does not apply retrospectively.

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[13] Accordingly, the judgment creditor was allowed to claim the following:

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(i) interest at the rate of 12.8% from 6 June 1998 (the day after the date of default of payment by the judgment debtor) till 14 March 2001 (the date of judgment in default) on the sum of RM45,959.40;

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(ii) interest at the rate of 12.8% from 15 March 2001 (the day after the date of judgment in default) till 30 April 2001 (the day before the part payment of RM5,260.71) on the sum of RM45,959.40 and

(iii) interest at the rate of 12.8% from 1 May 2001 (the day after the date of part payment) till 14 March 2007 (the six year limit) on the balance sum of RM40,698.69.

Reasons For The Decision

[14] The bankruptcy notice was issued by the judgment creditor on 7 June 2007. There was no dispute that the bankruptcy proceedings were commenced within 12 years from the date of judgment (14 March 2001).

[15] There was no dispute that the court has the jurisdiction to confirm, reverse and/or modify the respondent's decision complained of. The judgment creditor is a person aggrieved by the decision of the respondent. (See s. 86 of the Bankruptcy Act 1967).

[16] There was also no dispute that the POD and the application to reverse or vary the decision of the respondent in rejecting the POD were both filed within time by the judgment creditor. (See rr. 184 and 186 of the Bankruptcy Rules 1969).

Whether The Limitation Period Of Six Years Applies

[17] Section 6(3) of the Limitation Act 1953 provides:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[18] Counsel for the judgment creditor submitted that s. 6(3) does not apply as the POD is not "an action upon any judgment". In support of this contention counsel cited the cases of *Majlis Agama Islam Selangor v. Bong Boon Chuen* [2009] 6 CLJ 405 and *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng* [1995] 3 CLJ 520.

[19] With respect, the court cannot agree with counsel's contention. The judgment relied on by the judgment creditor in this case is obviously the judgment in default dated 14 March 2001. The bankruptcy proceedings themselves were founded on the judgment in default and the POD filed as a result of the grant of the AO/RO by the court, is sequentially another step in the bankruptcy proceedings premised on the judgment in default. It is clear that the filing of the POD by the judgment creditor is an "action upon a judgment" otherwise it would mean that the judgment creditor had no locus to do so.

The Period Applicable For The Calculation Of Interest

[20] Section 6(3) of the Limitation Act 1953 provides that the maximum period for the recovery of the arrears of interest is six years from the date on which the interest became due.

[21] The judgment creditor claimed for interest for the period from 1 May 2001 to 27 May 2008 (date of AO/RO) (of about seven years eight months) whereas the respondent allowed interest for the period from 2 May 2001 to 4 June 2004 (of about three years 11 months).

[22] The court allowed interest to be claimed for a period of six years only from the date of judgment (14 March 2001) to 14 March 2007 (six years after the date of judgment).

[23] There is a plethora of cases establishing the principle that when interest has accrued at an earlier date and a judgment is obtained thereafter, the interest is merged into the judgment sum based on the Merger Principle.

[24] In *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787 the Federal Court held *inter alia*, that s. 6(3) of the Limitation Act 1953 applies to bankruptcy proceedings and that the arrears of interest may only be claimed for a period of six years from the date of the judgment. The Federal Court also held that interest claimed for the period before the judgment merges into the judgment debt and therefore the date the interest became due, is the date of judgment, and not the earlier date.

The Federal Court referred to and followed the decisions in *Re: Ernest Cheong Yong Yin (I.C. No. 7620423); Ex-parte: United Malayan Banking Corporation Berhad* [1997] 1 LNS 50 and in *Moscow Norodny Bank Ltd v. Ngan Ching Wen* [2004] 2 CLJ 241 FC.

[25] In this case the court applied the Merger Principle and allowed interest for the period from 6 June 1998 (the day after default of payment by judgment debtor) as per the judgment in default to 14 March 2001 (date of judgment in default) to merge into the judgment debt and consequentially the date the interest became due was the date of the judgment (14 March 2001) and not the earlier date.

[26] The respondent had limited the judgment creditor's claim for interest to a period of six years expiring on 4 June 2004. This date presumably was calculated from 5 June 1998 (the date of default of payment by judgment debtor) yet strangely the respondent did not see it fit to calculate and allow interest from this date (5 June 1998) but from 2 May 2001 (the date after the part payment). The reliance by the respondent on the date of 2 May 2001 as being the commencement date for the calculation of interest (or for that matter if the respondent had relied on 5 June 1998), is wholly without basis and is incorrect in view of the Merger Principle.

[27] The judgment creditor was entitled to claim for interest for six years from 15 March 2001 (the day after judgment in default) up to 14 March 2007 only, pursuant to s. 6(3) of the Limitation Act 1953. The judgment creditor was not entitled to claim for interest beyond the six years up to 27 May 2008 (the date of AO/RO).

[28] The principle enunciated in *Affin Bank Bhd v. Lim Ah Hee (supra)* was followed by Kang Hwee Gee J (as he then was) in the case of *Re Ang Swee Hian; ex p Avenue Securities Sdn Bhd* [2008] 10 CLJ 467.

The Rate Applicable For The Calculation Of Interest

[29] The judgment in default stipulated that interest was payable at the rate of 12.8% per annum on the sum of RM45,959.40 from 6 June 1998 till full payment.

[30] Section 43(6) of the Bankruptcy Act 1967 provides that:

> Where a debt has been proved upon a debtor's estate and such debt includes interest or any pecuniary consideration *in lieu* of interest, such interest or consideration shall for the purposes of dividend be calculated at a rate not exceeding six per centum per

A annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full.

B **[31]** However, s. 43(6) was amended by s. 6 of Act A 1197 which reads:

Section 43 of the principal (Bankruptcy) Act is amended:

(b) in subsection (6), by substituting for the words "without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full" the words "up to the date the receiving order is granted by the court".

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D **[32]** This meant that the ceiling for the calculation of the rate of interest was fixed at 6% per annum up to the date of an AO/RO.

[33] The amendment to s. 43(6) came into force on 1 October 2003.

E **[34]** Federal counsel for the respondent argued that the amendment to s. 43(6) operated retrospectively and as such the maximum rate of interest that could be claimed by the judgment creditor was 6% per annum only, notwithstanding that the judgment in default had allowed for 12.8% per annum. In effect, F the respondent only allowed the judgment creditor to claim for interest from 2 May 2001 to 4 June 2004 at the rate of 6% per annum on the balance sum of RM40,698.69.

[35] Counsel for the judgment creditor contended that the G amendment to s. 43(6) does not take effect retrospectively but prospectively. The court agreed with this submission in law as the court is of the view that an amendment to the rate of interest chargeable under s. 43(6) is an amendment to a substantive law and not to a procedural requirement. The amendment cannot take H away the judgment creditor's accrued right under s. 43(6) as the amending Act did not clearly and specifically provide that the amendment would have a retrospective effect.

[36] The test to be applied when determining whether a written I law is prospective or retrospective is to ascertain whether it would affect substantive rights if applied retrospectively. If it would then the amendment must be construed as having prospective effect unless provided otherwise by the amending Act.

[37] In the present case, the judgment creditor is lawfully entitled to claim for interest upon the rate specified in the judgment in default. The right to claim interest at a specified rate pursuant to the terms of the judgment in default is a substantive right and the amendment ought not to be applied retrospectively. To do so would produce an unjust result as s. 43(6) deals with a substantive right. The judgment creditor had a legitimate expectation that as at 14 March 2001 (the date of the judgment in default) it had the right to interest at the rate of 12.8% per annum on the principal sum and not at 6% per annum until full realisation.

[38] In the case of *Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad* [1995] 1 CLJ 491 the issue was whether O. 29 r. 1(2B) of the Rules of the High Court 1980 applied retrospectively. The Court of Appeal held that it was not retrospective. Gopal Sri Ram JCA (as he then was) at p. 496 stated that:

> In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, *prima facie* that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights.
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> We derive support for the view that we have expressed from the decision of the Privy Council in *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56; [1983] 1 AC 553 also reported in [1983] 1 MLJ 1.

(See also Court of Appeal case of *RHB Bank Bhd v. Ya'acob Mohd Khalib* [2008] 1 CLJ 80).

[39] In view of the court's decision that the amendment to s. 43(6) cannot be applied retrospectively, the judgment creditor being the sole creditor of the judgment debtor could therefore claim for interest at the rate of 12.8% per annum from 15 March 2001 (day after the date of judgment in default) on the principal sum of RM45,959.40 up to 30 April 2001 (day before the date of part payment) and therefore interest at the rate of 12.8% per annum from 1 May 2001 on the balance principal sum of

RM40,698.69 up to 30 September 2003 (the day before the coming into force of the amendment to s. 43(6)). As the amendment has been held to be prospective the judgment creditor could only claim interest at the rate of 6% per annum from 1 October 2003 (the date of coming into force of the amendment) to 14 March 2007 (the date of limitation of six years). It is to be pointed out that the order of court given on 22 February 2012, to the effect that the judgment creditor could claim interest at the rate of 12.8% per annum from 1 May 2001 till 14 March 2007 is an error as the court had inadvertently overlooked the date of coming into force of the amendment to s. 43(6) on 1 October 2003 in its computation of the several periods.

Whether The Rate Of Interest At 12.8% Per Annum Granted By The Sessions Court Was Proper

[40] It is trite that a bankruptcy court cannot go behind a judgment which has not been set aside (see *Sovereign General Insurance v. Koh Tian Bee* [1988] 1 CLJ (Rep) 277 SC) unless there is evidence to show that the judgment was obtained by fraud or collusion. In this case the application to set aside the judgment was dismissed by the Sessions Court and the appeal to the High Court was also dismissed and there was no evidence of any collusion or fraud. Hence, it was a final judgment in which the rate of interest of 12.8% per annum was pronounced. In any event, the judgment in default was granted on 14 March 2001 which was prior to the coming into force of the amendment on 1 October 2003. The Sessions Court was well within its right to grant interest in excess of 6% per annum under the pre-amended s. 43(6).

[41] In the result the judgment creditor's application appeal was allowed with costs of RM3,000.